Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

O.S.C. Company,
Petitioner

v.

Edward G. Zymblosky, Jr., et al.,
Respondents

On Petition For Writ Of Certiorari
To The Pennsylvania Supreme Court

PETITION FOR WRIT OF CERTIORARI

Christopher P. Cullen, Esq.
Counsel for Petitioner
2 West Olive Street
Scranton, PA 18508
(570) 344-3244

QUESTION PRESENTED

I. Whether state court denies a party equal protection of law when it withholds the application of established case law and particularly, uses an internal operating procedure to apply the law differently to the Petitioner than to any other person and to limit the import and effect of an unpublished decision solely to the Petitioner.

PARTIES TO THE PROCEEDING

Petitioner is the O.S.C. Company, a partnership which owns property formerly used by a now defunct railroad, including land upon which Respondents situated a portion of their junk yard.

Respondents are Edward G. Zymbloski, Jr., Gail Zymbloski, and Edward G. Zymbloski, Jr., t/a Boots & Hanks 24-Hour Towing and Wrecking Service, the proprietors of a junk yard that used and continue to use Petitioners' land as part of their junk yard.

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINION AND JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
FEDERAL STATUTORY PROVISION INVOLVED	2
INTRODUCTION	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	8

I. Whether state court denies a party equal protection of law when it withholds the application of established case law and particularly, uses an internal operating procedure to apply the law differently to the Petitioner than to any other person and to limit the import and effect of an unpublished decision solely to the Petitioner.

CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Federal

Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed 2nd 98, reh denied 370 U.S. 965, 82 S.Ct. 1575, 8 L.Ed. 2nd 854 (1962)..... 15-16

Bishop v. Commonwealth of Pennsylvania, 634 F.2d 724 (3rd Cir.1980)..... 16

Lavasek v. White, 339 F.2d 861 (10th Cir.1965)..... 16

Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U.S. 100, 40 S.Ct. 306, 64 L. Ed. 476 (1920)..... 16

State

Christo v. Tuscany Inc., 308 Pa. Super. 564, 454 A.2d 1042, (Pa. Super. 1982)..... 15

Com. v. Brown, 447 Pa. Super. 454, 669 A.2d 984 (Pa.Super. 1995), appeal granted 544 Pa. 677, 678 A.2d 367 affirmed 550 Pa. 580, 708 A.2d 81..... 9

Com. v. Jones, 388 Pa. Super. 22, 564 A.2d 983 (Pa.Super. 1989)..... 10

Eisenberger v. Eisenburger,
38 Pa. Super. 569, 1909 Pa. Super. LEXIS 187.... 12

Foflygen v. Zemel, 420 Pa. Super. 18, 615
A.2d 1345 appeal denied 535 Pa. 619,
629 A.2d 1380 (1992)..... 10

Goodies Olde Fashion Fudge Co. v. Kuiros,
408 Pa. Super. 495, 597A.2d 141,
(Pa.Super. 1991)..... 15

Jackson v. Morter,
82 Pa. 291; 1876 Pa. LEXIS 229
(1876)..... 13

LARA, Inc.v. Dorney Park Coaster Co.,
542 A.2d 220 (Pa. Cmwlth. 1988)..... 12

Lawrence County v. Brenner, 582 A.2d 79,
84 (Pa. Cmwlth. 1990)..... 15

Lilley v. Johns-Manville Corp., 408 Pa. Super.
83, 596 A.2d 203 (Pa.Super. 1991)..... 10

Love v. Borough of Stroudsburg,
528 Pa. 320, 325, 597 A.2d 1137, 1139 (1991)..... 9

Malinder v. Jenkins Elevator and Mach. Co.,
371 Pa. Super. 414, 538 A.2d 509
(Pa.Super. 1988)..... 10

Mars Emergency Medical Services, Inc., v.

Township of Adams and Borough of Callery,
704 A.2d 1143 (Pa.Cmwlth. 1998)..... 11

Preiser v. Rosenzweig, 418 Pa. Super. 341,
614 A.2d 303, affirmed 538 Pa. 139,
646 A.2d 1166 (1992)..... 10

Rose Uniforms v. Lobel,
408 Pa. 421, 184 A.2d 261 (1962)..... 14

Rosenzweig v. Factor, 457 Pa. 492, 494,
327 A.2d 36, 38 (1974))..... 15

Soja v. Factoryville Sportsmen's Club,
361 Pa. Super. 473, 522 A.2d 1129 (Pa.
Super.1987)..... 11, 15

Surco Products, Inc. v. Kieszek, 367 Pa. 516,
519, 80 A.2d 842, 844 (1951)..... 15

Trachtenburg v. SIBARCO,
477 Pa. 517, 384 A.2d 1209 (1978)..... 12

Washburn's Appeal,
105 Pa. 480; 1884 Pa. LEXIS 131(1884)..... 13-14

York Ice v. Kearney,
344 Pa. 659, 25 A.2d 179 (1942)..... 14

UNITED STATES CONSTITUTION

U.S. Constitution Amendment XIV..... 2, 9

STATUTES AND AUTHORITIES

28 U.S.C. § 1257..... 2

210 Pa. Code § 65.37..... 3, 9

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seek a writ of certiorari to the Pennsylvania Supreme Court.

OPINION AND JUDGMENT BELOW

The order of the Pennsylvania Supreme Court denying Petitioner's Petition for Allowance of Appeal is unreported and is reprinted in the Appendix to this Petition as Appendix A. The decision of the Pennsylvania Superior Court which denied Petitioners appeal is unreported and reprinted in the Appendix to this Petition as Appendix B. The decision of the Lackawanna

County Court of Common Pleas, which initially violated Petitioner's right to equal protection is unreported and is reprinted in the Appendix to this Petition as Appendix C.

STATEMENT OF JURISDICTION

The Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal on April 26, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

FEDERAL STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the 14th amendment to the U.S. Constitution prohibits state governments from denying any person within its jurisdiction the equal protection of the laws. The 14th Amendment states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

INTRODUCTION

The Fourteenth Amendment to the United States Constitution provides that state governments afford equal protection of the laws to its citizens. In this case, the Pennsylvania courts denied the equal protection of the laws to the Petitioner by withholding the application of controlling case law precedent. In rendering its unreported decision, the state appellate court made use of No. 37 of its Internal Operating Procedures (210 Pa. Code. Section 65.37), which allowed that court to apply the law differently to the Petitioner than as to any other similarly situated person and to limit the import and effect of its decision solely to the Petitioner.[1]

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1 Section 37 of the Internal Operating Procedures of the Superior Court of Pennsylvania which governs the Superior Court's practice and procedure reads as follows: § 65.37. Unpublished Memoranda Decisions

A. An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding, except that such a memorandum decision may be relied upon or cited (1) when it is relevant under the doctrine of law of the case, res judicata, or collateral estoppel, and (2) when the memorandum is relevant to a criminal action or proceeding because it recites issues raised and reasons for a decision affecting the same defendant in a prior action or proceeding. When an unpublished memorandum is relied upon pursuant to this rule, a copy of the memorandum must be furnished to the other party to the Court.

B. After an unpublished memorandum decision has been filed, the panel may sua sponte, or on the motion of any party to the appeal, or on request by the trial judge, convert the memorandum to a published opinion. In the case of a motion of any party to the appeal or a request from the trial judge, such motion or request must be filed with the Prothonotary within 14 days after the entry of judgment or other order involved. The decision to publish is solely within the discretion of the panel.

STATEMENT OF THE CASE

The Petitioner in this case is the O.S.C. Company ("Petitioner"). O.S.C. Company was the defendant before the lower state court (60052-EQ-2002)(Lacka. Cty.) and the appellant before the Superior Court of Pennsylvania (1022 MDA 2003). The Respondents are Edward G. Zymblosky, et. al., who were the plaintiffs before the lower state court and the appellees before the Superior Court of Pennsylvania.

The instant appeal emanates from the lower state court's issuance of its "Order Relevant to Plaintiff's Petition for Preliminary Injunctive Relief Pursuant to Pa.R.Civ.P. 1531", which granted equitable relief to the Respondents in the form of a *permanent injunction* following a *preliminary injunction proceeding*, without requiring a bond, [a mandatory prerequisite for the grant of injunctive relief], and without a finding of "irreparable harm", as supported by an evidentiary record. Simultaneous to the equity proceeding, the Respondents pursued in the civil division of the lower state court an adequate remedy at law. The issuance of the lower state court's Order was preceded by the filing of numerous motions and petitions for dismissal, the majority of which the lower state court did not act upon. Quite remarkably, the lower state court judge who heard Respondents' at law action (97-CIV-3990), testified as a fact witness in the equity matter.

The genesis for the equity action brought by Respondents centers on a Sheriff's Sale of Respondents' real property to the Petitioner brought about by the judgment entered on the record by the lower state court in Petitioner's favor and against Respondents

in 97-CIV-3990 (Lacka. Cty.). Essentially, in civil action 97-CIV-3990 the Petitioners sued Respondents because after Respondents acquired title to pieces of land surrounding Petitioner's land, the Respondents began using Petitioner's land as part of their junk yard. After years of Respondents ignoring Petitioner's written demands to cease their continuing trespass, Petitioner filed a trespass action against Respondents. During the course of the at law action, Respondents admitted trespassing on the Petitioner's land for at least a period of 13 years. On December 22, 2000, the lower state court awarded the Petitioner damages of $6,500.00 per year for Respondents' trespass upon the Petitioner's land. Respondents filed exceptions to the lower state court's December 22, 2000 decision which were denied by the lower state court by Order dated January 11, 2001. This Order was entered as a judgment on the record in Petitioner's favor for trespass and awarded Petitioner damages in the amount of $6,500.00 per year or $541.66 per month. The entered judgment Order states in pertinent part:

> " 2. Judgment entered in favor of Plaintiff and against the Defendant with regard to Defendant's trespass upon Plaintiff's right of way without any authorization of the Plaintiff; and
>
> 3. Judgment is entered in favor of the Plaintiff and against the Defendants for fair rental damages of $6,500.00 per year, or $541.66 per month."

(Lower state court's decision of January 11, 2001, See Appendix C)

On January 12, 2001, Petitioner filed a post-trial motion with the lower state court to confirm the January 11, 2001 Order; however, the lower court did not act on the post-trial motion within thirty days. Through research, Petitioner determined that

where the elements for calculation are clear, damages awarded in a judgment entered on the record may be calculated from information set forth in the court's Order.

Pursuant to its research, Petitioner simply calculated the trespass damages awarded by the lower state court by multiplying the number of years that the court found that Respondents had trespassed by the amount of money that the lower state court found to be fair monthly damages plus legal interest. Petitioner believed that its calculation was correct and that belief was confirmed when the lower state court did not act on Petitioner's post trial motion within the required thirty day time period, i.e. by February 12, 2001.[2] On August 3, 2001, Petitioner filed with the lower state court, a praecipe for writ of execution in the amount of $184,349.26 and an affidavit pursuant to Pa.R.C.P. Rule 3129. The amount set forth in the Praecipe for Writ of Execution represented the amount of trespass damages with interest calculated by Petitioner in good faith reliance on the lower state court's findings of fact and final Orders of December 22, 2000 and January 11, 2001. Respondents did not object to the amount of Petitioner's calculation until well after the sheriff's sale and delivery of the sheriff's deed.

After a series of delays, on May 14, 2002, promptly at 10:00 AM, the Sheriff of Lackawanna County conducted a sheriff's sale of Respondents' parcels of land. The sale of the Respondents' parcels concluded with Petitioner as the highest bidder with the bid of $23,000.00.

Subsequent to the May 14, 2002 Sheriff's Sale of

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2 The lower state court finally acted on Petitioner's motion for post trial relief on January 8, 2002, 361 days after Petitioner had filed its post-trial motion on January 12, 2001 and also after the Superior Court dismissed Respondents' appeal on June 11, 2001. The lower state court's decisions of December 22, 2000 and January 11, 2001 became final on June 11, 2001.

Respondents' parcels to Petitioner, the Sheriff's solicitor prepared a sheriff's deed for the former Respondents parcels which transferred title to the parcels to the Petitioner. The Sheriff of Lackawanna County executed the deed on July 17, 2002, and filed it in the office of the Recorder of Deeds on July 18, 2002.

The Respondents failed to take action under Pa.R.C.P. Rule 3132 to set aside the May 14, 2002 sheriff's sale at any time prior to the sheriff's delivery on July 18, 2002 of its deed to Petitioner. The Respondents took no timely action to invalidate the sheriff's sale.

On August 9, 2002, the Respondents filed to the lower state court action at law docketed to 97-CIV-3990, a Rule to Show Cause Why Deeds Issued by Sheriff of Lackawanna County Should Not Be Revoked. 97-CIV-3990 concluded on June 11, 2001 when the Superior Court dismissed Respondents' appeal. On September 12, 2002, Respondents filed to 60052-EQ-2002, a complaint in equity and a verified petition for a preliminary injunction alleging *inter alia* that Respondents had no adequate remedy at law.

On June 20, 2003, at 11:07 AM, the lower state court in 97-CIV-3990 issued its Order granting Respondents the requested at law relief based on findings of fraud and lack of authority despite the complete absence of a jury trial, full hearing or opportunity for a hearing. Approximately three hours later, at 1:51 PM, the lower state court in 60052-EQ-2002 issued its order granting Respondents equitable relief nearly identical to the at law relief granted by the lower state court in 97-CIV-3990, without requiring the posting of a bond. Both cases were appealed to the Superior Court. In 97-CIV-3990, (1021 MDA 2003 (Pa.Super.Ct)), the Pennsylvania Superior Court affirmed the lower state court's order which struck the sheriff's deeds that were issued to the Petitioner on the basis of a finding of fraud and lack of authority, and which directed that the property described

in the struck deeds be conveyed to the Respondent. In 60052-EQ-2002 (1022 MDA 2003 (Pa.Super.Ct)), the Superior Court dismissed as moot Petitioner's appeal stating "[T]he relief that was requested and granted by the trial court in the instant equity action is no longer required due to the fact that the property in question will now revert to Appellees (Respondents) thus eliminating any necessity for equitable relief... Since our decision in O.S.C. Company v. Zymblosky, et. al., No. 1021 MDA 2003 (Pa. Super. filed _____), has caused the property in question to revert to Appellees, Appellees no longer require the equitable relief which was requested and granted in the instant case. Accordingly, this appeal is dismissed as moot."

REASONS FOR GRANTING THE PETITION

This Court has not yet spoken on the constitutionality of the nonprecedential decisions used by the Pennsylvania Courts which, as they are not published and do not set precedent, allow the courts to apply the law differently to different parties.

I. Whether state court denies a party equal protection of law when it withholds the application of established case law and particularly, uses an internal operating procedure to apply the law differently to the Petitioner than to any other person and to limit the import and effect of an unpublished decision solely to the Petitioner.

The Equal Protection Clause of the 14th amendment to the U.S. Constitution prohibits state governments from denying any person within its jurisdiction the equal protection of law. The 14th Amendment states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce

> any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV. In Love v. Borough of Stroudsburg, the Pennsylvania Supreme Court stated: "The equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution." Love v. Borough of Stroudsburg, 528 Pa. 320, 325, 597 A.2d 1137, 1139 (1991) (Citations omitted) The interest at issue is the Petitioner's title to land acquired at an uncontested sheriff's sale; title is further evidenced by duly executed and filed sheriff's deed. The equal protection clause is intended to provide "equal application" of the laws to all citizens. It requires that the laws of a state (including case law) must be applied equally and treat an individual in the same manner as others in similar conditions and circumstances.

In the instant matter, the state appellate court, the Pennsylvania Superior Court, denied Petitioner equal protection of law by withholding the application of established case law set down by the Pennsylvania Supreme and Superior Courts, and did so in an unconventional manner, i.e. an unpublished memorandum decision pursuant to Superior Court Internal Operating Procedures Section 37 (210 Pa.Code § 65.37). The Superior Court is required to follow the case law established by the Pennsylvania Supreme Court. Here, however, the Superior Court of Pennsylvania withheld consideration and application of the case law of the Pennsylvania Supreme Court. Com. v. Brown, Com. v. Brown, 447 Pa. Super. 454, 669 A.2d 984 (Pa.Super. 1995), appeal granted 544 Pa. 677, 678 A.2d 367 affirmed 550 Pa. 580, 708 A.2d 81 (function of Superior Court is limited to maintaining and effectuating laws established by the Pennsylvania Supreme Court); Foflygen v. Zemel, 420 Pa. Super. 18, 615

A.2d 1345 appeal denied 535 Pa. 619, 629 A.2d 1380 (1992)(the Superior Court, as our intermediate appellate court, is obligated to follow precedent set down by the Supreme Court, and is not free to disregard existing laws of the state and decisions of the Pennsylvania Supreme Court). In Malinder v. Jenkins Elevator and Mach. Co., 371 Pa. Super. 414, 538 A.2d 509 (Pa.Super. 1988), the Superior Court stated:

> "Where the Supreme Court has spoken on a particular subject, it is our obligation, as an intermediate appellate court, to follow and apply that decision so as to establish some measure of predictability and stability in our case law. In the absence of a legally relevant distinction between the facts of a previous case and the case before us, we are obliged to follow the dictates of the Supreme Court's decision in the prior case. Resolving cases by attempting to create irrelevant, factual distinctions impedes application of the doctrine of stare decisis, the principal function of which is to imbue the judicial system with some measure of predictability and stability, and places the development of the law in a constant, uncertain state of flux such that neither practioners nor trial judges can, with any degree of predictability, determine the proper application of the law to each new case involving similar facts that comes before them. It also is not our prerogative to apply different methods of analysis where our Supreme Court has made clear which particular analysis it believes should be applied to a particular situation."

Id. (For similar holdings see also: Preiser v. Rosenzweig, 418 Pa. Super. 341, 614 A.2d 303, affirmed 538 Pa. 139, 646 A.2d 1166 (1992), Lilley v. Johns-Manville Corp., 408 Pa. Super. 83, 596 A.2d 203 (Pa.Super. 1991), Com. v. Jones, 388 Pa. Super. 22, 564 A.2d 983 (Pa.Super. 1989)).

To the extent that the Superior Court wished to overturn its own case law, and pursuant to its own internal operating

procedures, it may do so only in a published opinion which would then be equally applicable to all citizens. In this case, the decision was wholly contrary to established and unquestioned precedential decisions, statutes, and principles of law.

Pennsylvania case law prohibits a permanent injunction remedy from being granted after only a preliminary injunction hearing. The lower state court issued an order that permanently divested Petitioner of its title to property after only a preliminary injunction hearing. Pennsylvania case law holds that: "It is improper for a trial judge to treat a hearing on a preliminary injunction as a final hearing on the merits and as a basis for a permanent injunction...." Mars Emergency Medical Services, Inc., v. Township of Adams and Borough of Callery, 704 A.2d 1143 (Pa.Cmwlth. 1998)(emphasis added)(citations omitted). In LARA, Inc.v. Dorney Park Coaster Co., the Commonwealth Court held:

> "It is well settled that it is improper for a trial judge to treat a hearing on an application for a preliminary injunction as a final hearing on the merits, and as a basis for a final decree unless so stipulated by the parties. Soja v. Factoryville Sportsmen's Club, 361 Pa. Superior Ct. 473, 522 A.2d 1129 (1987); Naus and Newlyn, Inc. v. Mason, 295 Pa. Superior Ct. 208, 441 A.2d 422 (1982); Township of Clinton v. Carmat, Inc., 288 Pa. Superior Ct. 433, 432 A.2d 238 (1981); Raw v. Lehnert, 238 Pa. Superior Ct. 324, 357 A.2d 574 (1976); Crestwood School District v. Topito, 76 Pa. Commonwealth Ct. 321, 463 A.2d 1247 (1983). The rationale against consolidation of these two proceedings is that there are separate and distinct standards which govern a request for a preliminary injunction and a request for a permanent injunction. A preliminary injunction turns on the presence of imminent, irreparable harm, while a permanent injunction is warranted if no adequate remedy at law exists for a legal wrong. Soja."

LARA, Inc.v. Dorney Park Coaster Co., 542 A.2d 220 (Pa. Cmwlth. 1988). The lower state court conducted several days of hearings on the Respondents' preliminary injunction request and then improvidently used those hearings as a basis for the issuance of a permanent injunction remedy.

Pennsylvania case law also holds that a court in equity has no jurisdiction to hear and decide a case involving a disputed title to land. Pennsylvania case law maintains that where a defendant possesses a right to a jury trial, no jurisdiction exists for a court in equity and the equity action should be dismissed. In 1978, the Pennsylvania Supreme Court addressed this issue in Trachtenburg v. SIBARCO, in which the Court stated:

> "A defendant's right to have a jury as the ultimate finder of fact, **a right not available in equity** (see Pa.R.Civ.P. 1513) is an important right not to be lightly regarded. **This right was denied appellant when its preliminary objections to the court's equity jurisdiction were dismissed.**"

Trachtenburg v. SIBARCO, 384 A.2d 1209, 477 Pa. 517 (1978). (Emphasis added)

In Eisenburger v. Eisenburger, the Pennsylvania Superior Court, after reviewing Pennsylvania Supreme Court case law, stated:

> "a mere glance at these cases show that they hold that **a court of equity has no jurisdiction to settle a disputed legal title to land.** In such cases **the defendant has the right to have the disputed questions of fact affecting his legal title submitted to a jury,** according to the rules of law."

Eisenberger v. Eisenburger, 38 Pa. Super. 569, 1909 Pa. Super. LEXIS 187 (Emphasis added).

Here, the lower state court ordered the Petitioner to reconvey the sheriff's deeds to Respondents while acting without the assistance of a jury, and the state appellate court affirmed the result in a manner which denied Petitioner its right to due process.

In Jackson v. Morter, the Pennsylvania Supreme Court determined a case with a fact pattern similar to that which was before the lower state court. In Jackson v. Morter, the real estate of Morter was sold at a sheriff's sale and Morter attempted to regain the title to the land in court by accusing the purchaser of fraud. The Pennsylvania Supreme Court determined that it was error to not have a trial by jury. The Pennsylvania Supreme Court stated:

> "**The question was as to the validity of the title acquired by the purchaser at sheriff's sale**....Where, however, the title of the purchaser has been fully confirmed, when the term has passed and the deed has been recorded and delivered, a different case is presented; all irregularities and minor defects have been waived or cured. **If want of power to sell, or gross fraud in the sale, is alleged, the purchaser has a right to trial by jury.**"

Jackson v. Morter, 82 Pa. 291; 1876 Pa. LEXIS 229 (1876)(emphasis added).

In Washburn's Appeal, a case in which one of the parties challenged the title of the other party in court, the Pennsylvania Supreme Court stated that:

> "The testimony taken in the behalf of the plaintiff, was to the effect that he had purchased and was the owner in fee of the premises in dispute....We cannot take from the respondent the right to have these questions of fact submitted to a jury, according to the rules of law; to that mode of trial he is entitled under the constitution."

Washburn's Appeal, 105 Pa. 480; 1884 Pa. LEXIS 131(1884). (Emphasis added).

In York Ice v. Kearney, the Pennsylvania Supreme Court based its decision on a series of cases which held that the defendant, in a case where a plaintiff seeks to have title to land cancelled in court on the grounds of fraud, possesses a right to trial by jury.

> "(The Judge) considering a bill for a decree of cancellation of deeds for fraud, dismissed it on the ground that the right to the title evidenced by the deeds was **triable at law with the right to a jury trial** of which the parties should not be deprived..."

York Ice v. Kearney, 25 A.2d 179, 344 Pa. 659(1942)(Emphasis added)(citations omitted).

In the instant matter, the lower state court acted in equity, adjudicated a real property title dispute, and entered an order stripping from Petitioner title to land without the benefit of a trial by jury. It is clear that Petitioner has the right to a trial by jury. The lower state court was without jurisdiction to act in equity and to issue a permanent injunction.

Pennsylvania case law holds that an injunction is a nullity if a bond is not required to be posted by the court. The order issued by lower state court did not comply with the provisions of Pa.R.C.P. Rule 1531 (b) in that the order failed to require the posting of a bond. As the Pennsylvania Supreme Court recognized in Rose Uniforms v. Lobel, Pa.R.C.P. 1531 governs the grant of a preliminary injunction and the rule provides: "...a preliminary or special injunction shall be granted only if (1) the plaintiff files a bond in an amount fixed and with security approved by the court..." Rose Uniforms v. Lobel, 408 Pa. 421, 184 A.2d 261 (1962). The Pennsylvania Supreme Court also determined:

> "As previously stated, the court below granted a preliminary injunction without fixing security. Subsequently, it did fix security but such security was not posted until after the injunction had been entered and this appeal taken. The court below was without power to grant the preliminary injunction in the outlined fashion."

Rose Uniforms v. Lobel, 408 Pa. 421, 184 A.2d 261 (1962). In Goodies Olde Fashion Fudge Co. v. Kuiros, the Superior Court found the following:

> "'The *failure of the trial court to require the posting of a bond* to secure a preliminary injunction as required by Pa.R.Civ.P. 1531(b) is a **fatal defect requiring an appellate court to vacate the injunction**.' Such relief may be granted even if the injunction is otherwise proper."

Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa. Super. 495, 597A.2d141 (Pa.Super. 1991)(emphasis added)(citing Surco Products, Inc. v. Kieszek, 367 Pa. 516, 519, 80 A.2d 842, 844 (1951), Soja v. Factoryville Sportsmen's Club, 361 Pa.Super. 473, 522 A.2d 1129, 1131 (Pa.Super. 1987); Lawrence County v. Brenner, 582 A.2d 79, 84 (Pa. Cmwlth. 1990); Christo v. Tuscany Inc., 308 Pa.Super. 22, 454 A.2d 1042, (Pa. Super. 1982); Rosenzweig v. Factor, 457 Pa. 492, 494, 327 A.2d 36, 38 (1974)). The lower state court did not require the posting of a bond as part of the grant of preliminary injunctive relief in the form of a permanent injunction and Respondents did not raise this as a defect in post trial motions.

It is well settled that mere misapplication of case law can not be shown to be an invidious discrimination. In Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed 2nd 98, reh denied 370 U.S. 965, 82 S.Ct. 1575, 8 L.Ed. 2nd 854 (1962), this Court stated: "[w]e have said time and again that of the Fourteenth Amendment does not 'assue uniformity of judicial decisions.... (or) immunity from judicial error...." Id. U.S. 556-

557, S.Ct at 962-963, L.Ed. 2nd at 113-114 (citing Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee 252 U.S. 100, 40 S.Ct. 306, 64 L.Ed 476 (1920). This Court went on to state "[w]ere it not otherwise, every alleged misapplication of state law would constitute a federal constitutional question." Id.

In Beck, the Petitioner argued that the State of Washington misapplied law and singled out the Petitioner for special treatment by denying him the procedural safeguards the law affords to others to insure an unbiased grand jury. The Court in Beck found that the grand jurors were lawfully selected and instructed, and that no reported Washington State case law existed to support the Petitioner's argument. The Court determined that the "petitioner's argument here comes down to a contention that Washington law was misapplied." Id.

Here, the inequality of constitutional proportion which surpasses misapplication of law, "uniformity of judicial decisions.... [or] immunity from judicial error." Beck supra., is the trial and appellate courts' withholding of the application of established case law, and the appellate court's use of Section 37 of its Internal Operating Procedures to apply law differently to the Petitioner than as to any other similarly situated person, and to limit the import and effect of its decision solely to the Petitioner.

This is not the case where there exists a divergence of opinion among Pennsylvania Supreme Court Justices and Pennsylvania Superior Court Judges on a particular matter involving civil or criminal law. Bishop v. Commonwealth of Pennsylvania, 634 F.2d 724 (3rd Cir. 1980). Nor is this a case where the Petitioner alleges state appellate inconsistency or lack of uniformity in judicial decision as a basis for a claim of a due process violation. Beck, supra, Lavasek v. White, 339 F.2d 861 (10th Cir. 1965). Rather, and more importantly, this is a case where the Petitioner from inception argued that proper application of established case law as reported by the courts of the Commonwealth of Pennsylvania would provide the Petitioner with the same procedural safeguards the law affords others. Instead, the state appellate court affirmed the lower state court's decision to strip the Petitioner of title to real property without first affording the Petitioner due process and to withhold the equal

protection of law by not applying the law. Under these circumstances, the action of the appellate court constitutes invidious discrimination and a denial of due process. Both in the at law and equity actions before the lower state court, and in each of the respective appeals to the Pennsylvania Superior Court, the application of established case law was withheld and the Petitioner's constitutional rights to due process and equal protection were set aside through the selective use of Section 37 of the Superior Court's Internal Operating Procedures.

This particular question has not been addressed previously by this Court. This Petition provides this Honorable Court with an opportunity to do so.

The decisions of the Pennsylvania Superior Court and lower court withheld the application of voluminous amounts of established case law and clearly denied Petitioner equal protection of the laws and due process.

CONCLUSION

The decision rendered by the lower state court and affirmed by the state appellate court through the issuance under Section 37 of an unpublished memorandum decision amounts to an arbitrary and capricious exercise of power in clear conflict with those fundamental principles of due process and equal protection which were established in our systems of jurisprudence for the protection and enforcement of private rights. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

Christopher P. Cullen
2 West Olive Street
Scranton, PA 18508
(570) 344-3244

Counsel for Petitioner

July 25, 2005

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

No. 841 MAL 2004

Petition for Allowance of Appeal From
The Order of the Superior Court

O.S.C. COMPANY,
Petitioner

v.

EDWARD G. ZYMBLOSKY, JR., AND GAIL ZYMBLOSKY, HIS WIFE, AND EDWARD G. ZYMBLOSKY, JR. T/A BOOTS & HANKS 24-HOUR TOWING AND WRECKING SERVICE,
Respondents

No. 814 MAL 2004

Petition for Allowance of Appeal From
The Order of the Superior Court

EDWARD G. ZYMBLOSKY, JR., AND GAIL ZYMBLOSKY, HIS WIFE, AND EDWARD G. ZYMBLOSKY, JR. T/A BOOTS & HANKS 24-HOUR TOWING AND WRECKING SERVICE,
Respondents

v.

O.S.C. COMPANY,
Petitioner

ORDER

PER CURIAM

AND NOW, THIS 26TH DAY OF April, 2005, the Petititions for Allowance of Appeal are hereby **DENIED**.

TRUE AND CORRECT COPY
ATTEST: April 26, 2005

/s/ Amy K. Swartz
Amy K. Swartz,
Appellate Court Clerk

APPENDIX B

J. A15010/04

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

In the Superior Court of Pennsylvania

No 1022 MDA 2003

EDWARD G. ZYMBLOSKY, JR., AND GAIL ZYMBLOSKY, HIS WIFE, AND EDWARD G. ZYMBLOSKY, JR. T/A BOOTS & HANKS 24-HOUR TOWING AND WRECKING SERVICE,

Appellees

v.

O.S.C. COMPANY,

Appellant

Appeal from the Order Entered June 20, 2003
In the Court of Common Pleas of Lackawanna County
Civil Division at No. 60052-EQ-2002

BEFORE: BENDER, McCAFFERY and TAMILIA, JJ.

FILED: May 21, 2004

JUDGMENT ORDER

This is an appeal filed by O.S.C. Company (Appellant) from an order entered on June 20, 2003, which granted preliminary injunctive relief to Appellees.

The facts which give rise to Appellee's request for injunctive relief involve the transfer of Appellee's property to

Appellant by way of sheriff's sale, which was held on May 14, 2002. In the case of **O.S.C. Company v. Zymblosky, et. al**, No. 1021 MDA 2003 (Pa. Super. file ____), we have affirmed the trial court's order which struck the sheriff's deeds that were issued to Appellant on the basis of fraud and want of authority. Accordingly, the relief which was requested and granted by the trial court in the instant equity action is no longer required due to the fact that the property in question will now revert to Appellees, thus eliminating any necessity for equitable relief.

> It is well settled that this Court will not decide moot questions. *Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Boros*, 533 Pa. 214, 620 A.2d 1139 (1993) (intervening change in the facts of a case can moot a question on appeal); *Wortex Mills, Inc. v. Textile Workers Union*, 136, 221 A.2d 191 (1966)(Intervening expiration of tax collector's term of office in a quo warranto action rendered the appeal moot);

Rogers v. Lewis, 656 A.2d 1368, 1369 (Pa. 1995).

Since our decision in **O.S.C. Company v. Zymblosky, et. al.,** No. 1021 MDA 2003 (Pa. Super. filed _____), has caused the property in question to revert to Appellees, Appellees no longer require the equitable relief which was requested and granted in the instant case. Accordingly, this appeal is dismissed as moot.

Judgment Entered:

/s/David A. Szewczak
Prothonotary

Date: May 21, 2004

APPENDIX C

In the Court of Common Pleas of Lackawanna County
(Filed June 20, 2003)

2002-EQ-60052

EDWARD G. ZYMBLOSKY, JR., AND GAIL ZYMBLOSKY, HIS WIFE, AND EDWARD G. ZYMBLOSKY, JR. T/A BOOTS & HANKS 24-HOUR TOWING AND WRECKING SERVICE,
Plaintiff

vs.

O.S.C. COMPANY,
Defendant

::::::

land in question by the applicable provisions of "adverse possession." In the alternative, Zymblosky further claimed that they had an easement or license to use O.S.C.'s right-of-way.

3.The above-described matter was heard before the Honorable Terrance Nealon, who, on December 22, 2000, rendered a comprehensive "NON-JURY DECISION" Pursuant to Pa. R.C.P. 1038. In Judge Nealon's Order of December 22, 2000, Judge Nealon ruled:

> 1. The Defendants (Zymblosky) do not have an easement or license right to use Plaintiff's (O.S.C.'s) right-of-way which extends through two parcels of land owned by the Defendants along North Keyser Avenue, in Scranton;
>
> 2. Defendants have entered upon or used Plaintiff's right-of-way without the authorization of the Plaintiff;
>
> 3. Defendants unauthorized use of Plaintiff's right-of-way constitutes a trespass for which the Defendants must pay fair rental damages; and,
>
> 4. Fair rental damages are awarded to Plaintiff and against the Defendants in the amount of $6,500.00 per year, or $541.66 per month.

4.On or about December 29, 2000, Zymblosky filed exceptions to Judge Nealon's Decision, which was treated as a Motion for Post-Trial Relief Pursuant to **Pa. R. Civ. P. 227.1**. O.S.C. did not file a Motion for Exceptions or Motion for Post-Trial Relief. In an Opinion and Order dated January 10, 2001, Judge Nealon denied Zymblosky's exceptions and judgment was entered in favor of O.S.C. As noted in the Order, judgment was "entered for the Plaintiff and against the Defendants for fair rental damages for $6,500.00 per year or $541.66 per month."

5.On or about January 12, 2001, O.S.C. filed a "Motion for Clarification" of the Court's Order awarding damages, alleging therein the following:

> 6. The Court's Decision and Order does not state the date on which the Defendant's obligation to pay the fair rental damages began as a result of the trespass. Without this date, the Plaintiff is unable to calculate a sum certain. (Emphasis added).
>
> 7. Before the Plaintiff can proceed to a final judgment based upon the aforementioned Order, the Plaintiff is obligated to calculate damages based on a sum certain. (Emphasis added).
>
> 8. After a review of this Court's Opinion and Order of December 22, 2000, Plaintiff is unable to calculate Defendant's obligation to Plaintiff. (Emphasis added).

6.On or about January 22, 2001, Zymblosky filed a Notice of Appeal to the Superior Court of Pennsylvania, which immediately divested the lower court's jurisdiction to decide O.S.C.'s Motion for Clarification. By Order dated June 11, 2001, the Superior Court of Pennsylvania dismissed the appeal for failure to file a brief. (See O.S.C. v. Zymblosky, No. 215 MDA 2001, Pa. Super. June 11, 2001). Zymblosky never filed a Motion for Reconsideration or a Petition for Allowance of Appeal with the Supreme Court, and as such, the Court's Orders of December 22, 2000 and January 1, 2001 became final.

7.After the Superior Court's dismissal of Zymblosky's appeal, but before the Lower Court's Decision on O.S.C.'s Motion for Clarification, O.S.C., on or about August 3, 2001, filed a Praecipe for Writ of Execution in the amount of $184,349.26. Pursuant to this Praecipe, the Lackawanna

County Clerk of Judicial Records issued a Wrist of Execution in the same amount, to wit: $184,349.26. Although the Motion for Clarification was still pending, and despite representations made by O.S.C.'s Motion for Clarification, Counsel for O.S.C., with the help and assistance from an accountant, applied Judge Nealon's award of damages retroactively.

8.Pursuant to the above-described Writ, the Lackawanna County Sheriff scheduled an execution sale on November 20, 2001. The Sheriff was requested to sell all of Zymblosky's commercial property located on Keyser Avenue and Wood Street, in Scranton, Pennsylvania. Zymblosky's properties were specifically described in five (5) separate parcels attached to the "NOTICE OF SHERIFF'S SALE OF REAL PROPERTY PURSUANT TO RULE 3129.2."

9.On or about November 9, 2001, Zymblosky, by and through Counsel, presented a "Motion for Stay" seeking a Rule to Show Cause Why O.S.C.'s efforts to execute on the Court's Orders of December 22, 2000 and January 10, 2001 should not be stayed. In his Motion for Stay, Counsel for Zymblosky wrongfully represented to the Court that the matter was still on appeal, and accordingly, the underlying Orders were not final. Based on Zymblosky's misrepresentations, a Rule was granted and made returnable no later than November 3, 2001, with the condition that "all actions to be stayed in the matter while the motion and appeal are pending." After securing the Rule, Zymblosky did not file the Rule until November 19, 2001, thereby precluding any timely Answer from being filed by O.S.C. prior to the sale of November 12, 2001. The net effect of all of this activity was that the November 20, 2001 sale was stayed. (For a more detailed description of what specifically occurred, see Judge Nealon's Order, dated January 7, 2002, on O.S.C.'s Motion for Clarification).

10.Upon consideration of O.S.C.'s Motion for Clarification and Zymblosky's Motion for a Permanent Stay, Judge Nealon, on January 7, 2002, ordered, in pertinent part, as

follows:

> 1. Plaintiff's Motion for Clarification is **GRANTED** and consistent with the reasoning set forth above, the fair rental damages of $541.66 per month or $6,500.00 per year is to have prospective effect only, such that Defendants are liable for the same from December 22, 2000, into the future as long as the trespass continues; (Emphasis added).
>
> 2. Defendants' Motion for Stay is **DENIED**.

11.On or about January 14, 2002, O.S.C. filed an appeal to the Superior Court from Judge Nealon's Clarification Order. (No. 92 MDA 2002). On or about February 1, 2002, Zymblosky filed a cross appeal to the Clarification Order, which was dismissed by the Superior Court by Order dated October 31, 2002. (No. 244 MDA 2002). By Decision, dated January 24, 2003, the Supreme Court of Pennsylvania affirmed Judge Nealon's Clarification Order, dated January 7, 2002. [See **O.S.C. Company v. Zymblosky**, 819 A. 2d 123 (Pa. Super. 2003)]. Accordingly, the subject rental damages, as outlined in Judge Nealon's Order, were to be applied prospectively.

12.The Sheriff's Sale was, once again, scheduled for February 12, 2002. By agreement of the parties, Zymblosky filed a Motion for Continuance, which was granted until the next sale scheduled for May 14, 2002. (See order of Court dated February 12, 2002). It is important to note that, although Judge Nealon's Orders of December 22, 2000 and January 10, 2001 were to have "prospective effect only," and although Judge Nealon's Order was affirmed on appeal, O.S.C. never amended and/or modified its' Praecipe and resulting Writ, which were originally filed in August, 2001.

13.On or about May 14, 2002, Counsel for Zymblosky

presented to the Motions Court Judge a Motion to Place Monies into Court and Motion for Continued Stay. Judge Carmen Minora, the Motions Court Judge, granted Zymblosky an Order in the form of a Rule Returnable ordering a Hearing on Zymblosky's Motions to be held on July 5, 2002. As a part and parcel of the Order, the Court stayed the Sheriff's Sale, which was scheduled for May 14, 2002. There is a factual dispute as to whether O.S.C.'s Counsel was present at the time the Order and Rule were signed, and a further factual dispute as to whether the Order and Rule were ever served upon the Sheriff, and if so, when. O.S.C. denies being present when Judge Minora signed the Order and Rule and denies ever being served with same. Deputy Sheriff Fran DiRienzo testified and claimed that she conducted the subject Sheriff's Sale of May 14, 2002, and further claimed that she did not receive any Stay Order pertaining to the subject sale. The competent and credible evidence strongly suggests that service was not made upon the Sheriff on the date of the sale. Assuming that service wasn't made, there is also a legal dispute as to the effect of Judge Minora's Order.

14.The May 14, 2002 sale continued uninterrupted and Zymblosky's commercial real estate listed on the Sheriff's Notice was sold to O.S.C. in execution and enforcement of the judgment as represented by O.S.C.

15.On May 29, 2002, pursuant to a "Praecipe to Tender Rental to Clerk of Judicial Records," Zymblosky tendered tot he court the sum of $9,208.61. By Order dated July 5, 2002, Judge Trish Corbett refused to entertain Zymblosky's Motion to Place Monies into Court and/or Continued Stay.

16.By Deed dated July 17, 2002, the Sheriff of Lackawanna County conveyed to O.S.C. all of Zymblosky's real estate listed on the Notice of Sale. As indicated above, situated on Zymblosky's real estate was Zymblosky's commercial property, currently known as "Boots & Hanks 24-Hour Towing & Wrecking Service." Correspondingly, the

schedule of distribution associated with the sale and transfer was filed on or about July 18, 2002. Zymblosky did not file a Petition to Set Aside the Sale Pursuant to Pa. R. Civ. P. 3132 and/or 3135. On July 30, 2002, pursuant to another Praecipe, Zymblosky tendered additional monies, to wit: $1,083.32 to the Lackawanna County Clerk of Judicial Records.

17.Zymblosky, on or about August 9, 2002, through new Counsel, filed to Number 97 - CIV. - 3990 a "Rule to Show Cause Why Deeds by Sheriff of Lackawanna County Should not be Revoked." On September 4, 2002, O.S.C. filed Preliminary Objections to this Petition and Rule. The matter was assigned to Judge Nealon for resolution.

18.On or about September 12, 2002, Zymblosky filed a Complaint in Equity against O.S.C. (Equity No. 60052 of 2002). In this Complaint, Zymblosky alleges the following:

a. The Writ of Execution itemizing the judgment in the amount of $183,349.26 is erroneous;

b. "Neither the docket, nor any order, judgment, verdict or decree, indicated that judgment had been entered in favor of Defendant and against the Plaintiff in the amount of $184,349.26." (See Paragraph 10 of the Complaint).

c. Judge Nealon's Clarification Order of January 7, 2002 clearly indicated that the award of damages was to have "prospective effect only;"

d. Although the award was to have "prospective effect only," O.S.C. never caused the Writ to be amended before the sale of May 14, 2002;

e. Prior to the May 14, 2002 sale, Zymblosky

obtained a stay of that sale signed by Judge Minora on said date;

f. By virtue of the foregoing, the Sheriff of Lackawanna County lacked jurisdiction to either conduct the execution sale and/or deliver a Deed dependent thereon. (See Paragraph 32 of the Complaint).

19.In the Equity Complaint, and among the relief requested, Zymblosky is requesting that the Sheriff's Deed to O.S.C. be declared void and of no effect; that O.S.C. be enjoined from executing any transfers or conveyances to third parties; that the Court direct O.S.C. to execute a reconveyance to Zymblosky.

20.Contemporaneous with the filing of the Equity Complaint and as part of the same action, Zymblosky also filed a Petition for Preliminary Injunctive Relief Pursuant to Pa. R. Civ. P. 1531. The allegations in the Petition are similar to those in the Complaint, except that the Petition advances allegations of alleged irreparable harm that may occur to Zymblosky's property and business if O.S.C. transfers the property and/or continues to file criminal trespass actions while this matter is still pending. Among the claims for relief, Zymblosky, in his Petition for a Preliminary Injunction, requests that O.S.C. be enjoined from transferring the subject property and from filing any criminal trespass actions. Zymblosky further requests that O.S.C. be directed to execute a reconveyance to the Plaintiff of the subject property. O.S.C. filed Preliminary Objections to the Complaint in Equity, as well as the Petition for Injunctive Relief. O.S.C.'s Preliminary Objections were denied as procedurally inappropriate. (See Transcript of Record of September 20, 2002).

21.The Court held numerous Hearings on Plaintiffs' Petition for Injunctive Relief. These Hearings were held on September 17, 2002, September 20, 2002, September 26, 2002,

October 31, 2002, November 14, 2002, December 23, 2002, January 16, 2003, January 30, 2003, and May 1, 2003.

22.The procedural foundation for Preliminary Injunctive Relief is grounded in **Pa. R.C.P. 1531**. The standards for granting a Preliminary Injunction have been set forth in **Zebra v. School District of City of Pittsburgh**, 296 A.2d 748 (Pa. 1972); **Berger By and Through Berger v. West Jefferson Hill School District**, 669 A. 2d 1084 (Pa. Cmwlth. 1995); **Santoro v. Morse**, 781 A. 2d 1220 (Pa. Super. 2001); and **Limerick Auto Body, Inc. v. Limerick Collision Center, Inc.**, 769 A.2d 1175 (Pa. Super. 2001).

In **Zebra v. School District of City of Pittsburgh**, supra., the Supreme Court of Pennsylvania had set forth the standards for determining the issuance of a Preliminary Injunction wherein it stated:

> In order to sustain a preliminary injunction, the plaintiff's right to relief must be clear, the need for relief must be immediate and the injury must be irreparable if the injunction is not granted. **Id. at 750**.

It is also settled that the granting of a Preliminary Injunction is necessary to prevent immediate and irreparable harm that could not be compensated by damages. **Albee Homes, Inc. v. Caddie Homes, Inc.**, 207 A.2d 768 (Pa. 1965). Further, unless the Plaintiff's right is clear and the wrong is manifest, a Preliminary Injunction will not be generally awarded. **Id. at 771**.

23.The Court recognizes that the Plaintiff, Zymblosky, failed to file a timely Petition to Set Aside the subject Sheriff's Deed pursuant to **Pa. R. Civ. P. 3131**. **Beckman v. Altoona Trust Company**, 2 A. 2d 826 (Pa. 1939). Furthermore, this Court also recognizes that the Plaintiff, Zymblosky also failed to file timely Exceptions to the subject transfer pursuant to **Pa.**

R.Civ.P. 3135 and 3136. **Concorde-Liberty Savings and Loan Association v. N.T.C. Properties, Inc.**, 312 A. 2d 4 (Pa. 1973). However, the failure to file a timely Petition or Exceptions, in and of itself, is not conclusively determinative or dispositive of the central issue before this Court.

24.After the delivery of a sheriff's deed to a purchaser, and absent the filing of a timely Petition or Exceptions as noted above, one could still attack the subject transfer on the grounds of fraud and/or lack of authority. If the sheriff lacks authority to sell the subject property and/or there is evidence of fraud, the existence of either or both of these two (2) conditions can vitiate the transfer of a sheriff's deed. **Workingmen's Savings & Loan Association v. Kestner**, 652 A. 2d 327 (Pa. Super. 1994); **Knox v. Noggle**, 196 A. 18 (Pa. 1938); **Vend-A-Matic, Inc. v. Frankford Trust Co.**, 442 A. 2d 1158 (Pa. Super. 1982).

25. Despite O.S.C.'s representation, in its' Motion for Clarification, and irrespective of the Court's ruling on Clarification, O.S.C., nonetheless, wrongfully represented ab initio that there existed a judgment in excess of One Hundred and Eighty Thousand ($180,000.00) Dollars as a predicate to the May 14, 2002 Sheriff's Sale. Without addressing the issue of fraud, it is clear that the Sheriff did not have authority to proceed on a judgment, the amount of which was grossly in error. There simply was no judgment of record, which reflected a judgment in excess of One Hundred Eighty Thousand ($180,000.00) Dollars regarding the subject litigation.

26. During the course of the Preliminary Injunction Proceeding and immediately thereafter, O.S.C. filed several additional claims for relief. Other than those claims which were disposed of on the record, O.S.C. filed a Motion for Abatement, which was subsequently withdrawn, in writing, on or about May 6, 2003.

27.On or about May 8, 2003, O.S.C. filed a "Motion to

Dismiss Petition for Preliminary Injunction and Complaint in Equity based upon Constitutional Right to Trial by Jury." It is clear that what is apparently before this Court at this time is a request for Preliminary Injunctive Relief pursuant to **Pa. R.Civ.P. 1531**, which does not necessitate the submission to a Jury for resolution. The Court will issue a Rule Returnable on the merits of O.S.C.'s claims concerning this Motion's applicability to the Complaint and Proceeding in Equity.

28.On or about June 3, 2003, O.S.C. filed a "Motion to Dismiss for Untimely Filing of Plaintiffs' Petition for Preliminary Injunction and Complaint in Equity." Upon this Court's review of this submission, the legal authority on which this Motion is predicated is misplaced and the corresponding Argument lacks appropriate merit. This Court acknowledges that both the Equity action and the accompanying Petition for Injunctive Relief were timely filed considering the legal foundation n which same is advanced.

29.Accordingly, and by reason of this Court's review of the entire record, Zymblosky's right to injunctive relief is clear and the wrong identified herein is manifest. Furthermore, irreparable harm to Zymblosky is self evident and the relief requested is certainly immediate.

AND NOW, this 20th day of June, 2003, upon consideration of all of the testimony and exhibits introduced of record, as well as the Procedural History reflected in **O.S.C. V. Zymblosky, Et. Al.** filed to No. 97-CIV.-3990, it is hereby ORDERED AND DECREED as follows:

(A).The Plaintiff, Zymblosky's request for Preliminary Injunctive Relief is hereby GRANTED pursuant to **Pa. R.Civ.P. 1531**;

(B).The Defendant, O.S.C., is directed to recovery to Edward G. Zymblosky, Jr. and Gail Zymblosky, his wife, all of the parcels of real

estate which were the subject of the May 14, 2002 Sheriff's Sale;

(C).The Summary Criminal Trial filed to Docket No. N.T.-0000487-02 is hereby **STAYED** until this Equity action is resolved or unless and until the subject Deeds are otherwiseset aside and/or stricken by Order of Court in **O.S.C. v. Zymblosky Et. Al.** filed to No. 97-CIV.-3990, whichever occurs first;

(D).O.S.C.'s Motion for Abatement is hereby **WITHDRAWN**;

(E). O.S.C.'s Motion to Dismiss Petition for Preliminary Injunction based upon Constitutional Right to Trial by Jury is hereby **DENIED**;

(F).O.S.C.'s Motion to Dismiss Petition for Untimely Filing of Plaintiffs' Petition for Preliminary Injunction and Complaint in Equity is hereby **DENIED**.

BY THE COURT:

/s/ Robert A. Mazzoni
JUDGE ROBERT A. MAZZONI

ATTORNEY FOR PLAINTIFFS:
ARTHUR L. PICCONE, ESQUIRE
600 THIRD AVENUE
KINGSTON, PENNSYLVANIA 18701

ATTORNEY FOR DEFENDANT:
CHRISTOPHER P. CULLEN, ESQUIRE
1306 WOODLAWN STREET
DUNMORE, PENNSYLVANIA 18509